Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

(2)

NO. 03-1023

In The

Supreme Court of the United States

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD AND STEPHEN J. CICERO,
Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN BENITO RUSSO, ESQ.
Chief of Enforcement
LUISA MENCHACA, ESQ.
General Counsel
JULIA BILAVER, ESQ.
Counsel of Record
FAIR POLITICAL PRACTICES COMMISSION
428 J Street, Suite 620
Sacramento, CA 95814

Attorneys for Respondent
Fair Political Practices Commission

QUESTION RESTATED

Does the United States Supreme Court have jurisdiction to consider whether the Third District California Court of Appeal correctly interpreted state collection statute California Government Code section 91013.5, which specifically authorizes the California Fair Political Practices Commission, a state agency, to file a civil action to convert an administrative penalty to a civil money judgment, when the appellate court construed the statute to preclude Petitioners from using the collection proceeding as a second judicial forum to raise constitutional objections to the administrative penalty duly imposed upon them.

(Blank)

TABLE OF CONTENTS

Page

QUESTION RESTATED.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

JURISDICTION.....1

STATEMENT OF THE CASE.....1

I. THE FAIR POLITICAL PRACTICES COMMISSION AND THE POLITICAL REFORM ACT.....1

II. PETITIONERS CAC, HOWARD AND CICERO.....2

III. THE ADMINISTRATIVE ACTION.....3

IV. THE CIVIL COLLECTION ACTION.....5

V. PETITIONERS' STATEMENT OF THE CASE.....6

REASONS FOR DENYING THE WRIT.....9

I. LACK OF JURISDICTION.....9

II. PETITIONERS WERE NOT DEPRIVED OF A REASONABLE OPPORTUNITY TO HAVE THEIR RIGHTS HEARD AND DETERMINED.....12

III. PETITIONERS WAIVED THEIR RIGHT TO CONTEST THE VALIDITY OF THE ADMINISTRATIVE ORDER.....13

CONCLUSION.....16

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia,
378 U.S. 347 (1964).....11
Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 87, 93 (1982).....13
Bush v. Gore,
531 U.S. 98, 115 (2000).....11
Butz v. Glover Livestock Comm'n Co.,
411 U.S. 182, 187 (1973).....15
Fukuda v. City of Angels,
20 Cal.4th 805, 977 P.2d 693 (1999).....12
Johnson v. City of Loma Linda,
24 Cal.4th 61, 5 P.3d 874 (2000).....10
McCoy v. Shaw,
277 U.S. 302 (1928).....9
NAACP v. Alabama ex rel. Patterson,
357 U.S. 449, 457 (1958).....10
Newell Recycling Co., Inc. v. United States Envtl. Protection Agency,
231 F.3d 204 (5th Cir. 2000).....14
New York ex rel Doyle v. Atwell,
261 U.S. 590 (1923).....9
United States v. Bajakajian,
524 U.S. 321 (1998).....14
United States v. Emerson,
107 F.3d 77 (1st Cir. 1997).....14

United States v. Mackby,
339 F.3d 1013 (9th Cir. 2003).....14
Yamaha Corp. of Am. v. State Bd. of Equalization,
19 Cal.4th 1, 4, 960 P.2d 1031, 1034 (1998).....13

CONSTITUTIONAL PROVISIONS

U.S. Constitution
First Amendment.....5, 13
Sixth Amendment.....13
Seventh Amendment.....13
Eighth Amendment.....5, 13
Fourteenth.....5

STATUTES

28 U.S.C. § 1257.....1, 9

California Government Code
§§ 11400 through 11529 4
§§ 81000 through 91014.....1
§ 81002.....2
§ 83100.....1
§ 83111.....1
§ 83116.....5, 8
§§ 84100 through 84221.....2
§§ 90000 through 90007.....3
§§ 91000 through 91014.....8
§ 91013.5.....i, 5, 10

California Code of Civil Procedure
§ 1094.5.....10

REGULATIONS

California Code of Regulations, tit. 2, § 18361.....8

(Blank)

JURISDICTION

Petitioners have failed to show that an important federal question was properly raised and decided during the state court proceedings. Therefore, this Court's jurisdiction, as described in 28 U.S.C. § 1257 (a), does not apply to this case.

STATEMENT OF THE CASE

I. THE FAIR POLITICAL PRACTICES COMMISSION AND THE POLITICAL REFORM ACT

In 1974, in the wake of the Watergate scandal, a coalition of political reformers presented to the voters of California a statewide ballot initiative that they claimed would end corruption in politics by eliminating anonymous campaign contributions. The passage of the ballot initiative by the California electorate led to the creation of the California Fair Political Practices Commission (the "FPPC"), an independent, non-partisan state agency charged with responsibility for the impartial, effective administration and implementation of the Political Reform Act. Cal. Gov't. Code §§ 83100, 83111 (West 1993).

With the advent of the Political Reform Act, the campaign activities of candidates and committees were subjected to greater public scrutiny than at any other time in California's history. An express purpose of the

Political Reform Act is to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed, so that voters may be fully informed, and improper practices may be inhibited. Cal. Gov't. Code § 81002(a) (West 1993). To that end, the Political Reform Act establishes a comprehensive campaign reporting system designed to accomplish this purpose of disclosure.[1]

II. PETITIONERS CAC, HOWARD & CICERO

In 1992, the Enforcement Division of the FPPC received a complaint that Petitioners failed to file campaign statements as required by the Political Reform Act. The 1992 case was resolved by the issuance of a warning letter. Two years later, the Enforcement Division received a second complaint that Petitioners continued to ignore their duty to file campaign statements disclosing their campaign contributions and expenditures. Upon discovering that Petitioners had failed to file three periodic campaign statements, the Enforcement Division contacted Petitioners, and urged Petitioners to file the statements immediately. Petitioners responded by filing the three campaign statements.

The following month, on the eve of a contentious recall election, Petitioners had a duty to file a campaign

---

[1] The campaign reporting provisions of the Political Reform Act are generally contained in California Government Code sections 84100 through 84221 (West 1993 and Supp. 2003).

statement disclosing the receipt of a late contribution. However, Petitioners again failed to file the required statement. After the election, Petitioners had a duty to file a post-election campaign statement. However, Petitioners again failed to file the required statement. In response to Petitioners' repeated conduct, the Enforcement Division of the FPPC requested the California Franchise Tax Board (the "FTB"), a separate state agency, to audit Petitioners' campaign records.[2] The FTB reviewed Petitioners' campaign records for the period January 1, 1992 through June 30, 1994, with some cooperation from Petitioner Howard. During the period audited, Petitioners raised $141,559 and spent $103,091. The FTB audit revealed extensive campaign reporting violations by Petitioners, so the Enforcement Division of the FPPC initiated a formal administrative enforcement action against them.[3]

III. THE ADMINISTRATIVE ACTION

The FPPC enforcement action began with a report prepared by the Enforcement Division requesting that the FPPC Executive Director find probable cause to believe that Petitioners had violated the Political Reform

---

[2] The FTB's Political Reform Division conducts both discretionary and mandatory audits of campaign statements filed by candidates and committees in California. (See Cal. Gov't. Code §§ 90000 through 90007 (West 1993 and Supp. 2003).)

[3] For approximately 100 contributors of $100 or more, Petitioners did not disclose required information about the contributors, in violation of state campaign reporting laws. Petitioners also failed to keep complete records of their financial dealings, in violation of state recordkeeping laws.

Act. Petitioners received service of the report and notice of their right to request a probable cause conference, but they did not request that a conference be held. Upon the request of the Enforcement Division, a probable cause conference took place on June 14, 1995. Petitioners received notice of their right to submit a written statement to the Executive Director for his consideration at the probable cause conference, but they did not submit any writing to the Executive Director. Petitioners received notice of their right to appear in person or by telephone at the probable cause conference, but they did not make any appearance at the probable cause conference. On June 29, 1995, an order finding probable cause was issued. In accordance with the order, the Enforcement Division prepared an Accusation for signature by the FPPC Executive Director. The Accusation was then served on Petitioners.

With service of the Accusation, Petitioners received notice of their right to request an evidentiary hearing on the charges contained in the Accusation before an administrative law judge at the California Office of Administrative Hearings pursuant to the California Administrative Procedure Act. Cal. Gov't. Code §§ 11400-11529 (West 1993 and Supp. 2003). However, Petitioners did not request an administrative hearing as they were entitled to do. Having received no request from Petitioners for a hearing, the appointed commissioners of the FPPC issued a Default Decision and Order finding that Petitioners had committed 404 violations of the Political Reform Act, as alleged in the Accusation. The decision ordered Petitioners to pay the

maximum statutory penalty of $2,000 per violation. Cal. Gov't. Code § 83116(c) (West 1993).

IV. THE CIVIL COLLECTION ACTION

On November 27, 1995, the FPPC served Petitioners with the FPPC's Default Decision and Order, and a letter demanding payment of the administrative penalty. When Petitioners did not pay any portion of the penalty, the Enforcement Division filed a collection action in the Superior Court of the State of California for the County of Sacramento to reduce the administrative penalty to a civil money judgment, pursuant to the authority granted to the FPPC in Government Code section 91013.5.

Thereafter, Petitioners filed a petition for writ of administrative mandamus to set aside the Default Decision and Order on grounds that the administrative penalty violated their First, Eighth and Fourteenth Amendment rights. In their petition, Petitioners asked the trial court to stay the collection action. In September 1996 and again in July 1997, the trial court issued stay of trial on the merits of the FPPC collection action so that Petitioners could pursue their petition. However, for the next three years, Petitioners took no further action to schedule a hearing on the merits of their petition.

In May 2000, Petitioners filed a motion to dismiss the FPPC's collection action for failure to prosecute. In response, the FPPC filed a motion to dismiss Petitioners' petition for failure to prosecute. The trial court

dismissed Petitioners' petition, but did not dismiss the FPPC's collection action. In March 2001, the trial court granted the FPPC's motion for summary judgment in the collection action and ordered Petitioners to pay the outstanding administrative penalty plus interest. In a published opinion, the Third District California Court of Appeal affirmed the trial court ruling. The California Supreme Court, acting en banc, denied Petitioners' petition for review of the appellate court decision.

V. PETITIONERS' STATEMENT OF THE CASE

The FPPC generally objects to Petitioners' statement of the case as hyperbole, misleading, argumentative, uncorroborated, and outside the record. Specifically, the FPPC responds as follows:

First, Petitioners claim that there was evidence of corruption on the part of three elected state officials (Petition at 3). However, Petitioners have never offered any evidence supporting that assertion or connecting that assertion in any way to this action.

Second, Petitioners describe CAC as a true grassroots organization with a diverse, all-volunteer staff (Petition at 3). However, in previous pleadings, Petitioners have described CAC as a "committee comprised of activists who targeted politicians and

political figures supportive of legislation restricting the ownership of guns."[4]

Third, Petitioners claim that professional campaigns commonly file delinquent campaign statements (Petition at 4). However, Petitioners have not and could not practicably offer evidence to support this assertion as thousands of campaign statements are filed each year. Even if this claim could be proved, Petitioners conduct was a great deal more serious than simply filing campaign statements a few days late. After receiving a warning notice from the Enforcement Division of the FPPC regarding the failure to file campaign statements, Petitioners continued to disregard their duty to file on a repeated basis, and willfully deprived the voters of complete and accurate information of their financial activity. Such recidivist conduct cannot credibly be described as acting in "good faith," as Petitioners propose several times in their petition (Petition at 5, 8).

Fourth, Petitioners state that the probable cause conference in the administrative action was conducted by FPPC "enforcement" staff (Petition at 7). The intimation is that the same individual who made a determination of probable cause is also the same individual who prosecuted the enforcement case, which is simply not true. In accordance with the Political

---

[4] *See* Petitioners' Motion to Vacate Orders at p. 3, Sacramento County Superior Ct., Case No. 96AS00039. After Petitioners' petition had been dismissed for failure to prosecute, Petitioners filed a motion to set aside the dismissal on the basis that Judge Connelly, who ordered the dismissal, had a conflict of interest.

Reform Act, probable cause conferences are conducted only by the Executive Director of the FPPC, or an official acting in his or her stead.[5] From time to time, the Executive Director may seek assistance from the Legal Division of the FPPC. In this case, a senior attorney from the Legal Division, not the Enforcement Division, conducted the probable cause conference and signed a probable cause order as an Acting Executive Director. No single official at the FPPC impermissibly wore all four hats as prosecutor, judge, jury and executioner as Petitioners suggest.

Fifth, Petitioners assert that the penalty for not filing a campaign statement is substantially less than the penalty for filing an incomplete campaign statement (Petition at 9). This contention is without merit. The Political Reform Act contains various administrative, civil, and criminal penalties that may be imposed for the violation of its provisions. On a case by case basis, the administrative (FPPC), civil (FPPC or private citizen), and criminal (state attorney general or local district attorney) prosecutors having authority to enforce the Political Reform Act have broad discretion within the parameters set by statute to charge violations and seek penalties as are warranted by the facts of a particular case. Cal. Gov't. Code §§ 83116, 91000-91014 (West 1993). No provision of the Political Reform Act requires that a lesser penalty be imposed for the failure

---

[5] *See* Cal. Gov't. Code § 83116 (requiring the members of the Commission to make a determination of probable cause); and Cal. Code Regs., tit. 2 § 18361(d) (delegating the responsibility of making determinations of probable cause to the Executive Director).

to file a campaign statement than for the filing of an incomplete campaign statement.

REASONS FOR DENYING THE WRIT

I. LACK OF JURISDICTION

The jurisdiction of this Court as limited by 28 U.S.C. § 1257 does not permit the Court to grant certiorari review of a state court decision that rests on an independent and adequate state ground. In their petition, Petitioners fail to establish that a substantial federal question was properly raised and decided in the state court proceedings. The proper method for raising a federal constitutional question in a state court proceeding is governed by the practice of that state. For example, in *New York ex rel Doyle v. Atwell*, 261 U.S. 590 (1923), this Court did not find jurisdiction to consider the federal question of whether a local ordinance was valid under the federal constitution where the New York Supreme Court held that *habeus corpus* was not the proper state procedure for raising the question. Similarly, in *McCoy v. Shaw*, 277 U.S. 302 (1928), this Court did not find jurisdiction to consider the federal question of whether the imposition of a tax violated federal law where the Oklahoma Supreme Court held that a suit in equity to enjoin the collection of the tax was not the proper state procedure for raising the question.

In California, the exclusive procedure available for seeking judicial review of an administrative penalty on

constitutional grounds is the filing of a petition for writ of administrative mandamus pursuant to California Code of Civil Procedure section 1094.5.[6] As held by the California Supreme Court, the factual and legal conclusions of a state administrative agency are binding in later litigation if they are not challenged by way of mandamus. *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 70-71, 5 P.3d 874, 879-880 (2000). Petitioners were not only aware of this procedural method for seeking judicial review, but actually took the initial steps to exercise this right by properly and timely filing the appropriate petition.[7] However, for three years, Petitioners took no further action to schedule their petition for hearing, and the matter was ultimately dismissed.

Thereafter, Petitioners sought a second opportunity to litigate their constitutional claims by raising them as a defense in the collection action filed by the FPPC. The state trial court and the state appellate court, however, did not consider the merits of Petitioners' constitutional

---

[6] The California appellate court correctly decided this issue by applying the common law doctrine of exhaustion of judicial remedies. (Pet. App. at 14a-17a.)

[7] In contrast, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), a cased cited by Petitioners, this Court held that its jurisdiction was not defeated when a highest state court made a novel ruling that constitutional issues should have been raised by way of an obscure procedural method. In this case, Petitioners try to make the argument that the California appellate court applied a novel interpretation of the de facto officer doctrine (Petition at 15). However, the de facto officer analysis (Pet. App. at 7a-13a) was consistent with previous case law and did not bear on the current issue of whether Petitioners' could raise their constitutional objections in an FPPC collection action.

arguments in the second proceeding because the statute authorizing the collection action was not the appropriate remedy for challenging the validity of the administrative penalty. Accordingly, Petitioners' failure to prosecute the merits of their constitutional objections in the earlier administrative mandamus action defeats the jurisdiction of this Court to consider those issues now.

This Court has jurisdiction to consider whether a state court went impermissibly beyond the "fair reading" of a state statute to evade reaching a federal question. *Bush v. Gore*, 531 U.S. 98, 115 (2000). But that is not the case here. The FPPC brought a collection action under the authority of California Government Code section 91013.5, a statute passed by the California Legislature in 1984, at the request of the FPPC, to provide an expeditious means of enforcement against individuals who fail to pay administrative penalties. Nothing in the explicit reading of the statute or its legislative history indicates that the legislature intended to create a second mechanism of wholesale judicial review for Petitioners.

Moreover, the inquiry of whether or not a state court distorted the interpretation of a state statute is reserved for extreme circumstances, which are not present in this case.[8] *Id.* Prior to the resolution of the FPPC collection action, Petitioners had three years to request a hearing on the merits of their constitutional objections, but chose

---

[8] *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964) (finding that the application of a state criminal trespass statute to sit-in demonstrators at a restaurant was inconsistent with the language of the statute).

not to proceed. Petitioners' lost opportunity rests squarely on their shoulders, not on the California court's reasonable interpretation of the FPPC collection statute and application of well-settled California case law.

II. PETITIONERS WERE NOT DEPRIVED OF A REASONABLE OPPORTUNITY TO HAVE THEIR RIGHTS HEARD AND DETERMINED

Petitioners argue that they were denied a reasonable opportunity to litigate their constitutional objections (Petition at 12-14). This contention is without merit. Abandoning an opportunity is not the same thing as being deprived of one. Petitioners let slip their opportunity provided by California law to contest the validity of the FPPC order and now mistakenly claim that there are two alternative modes of judicial review—an administrative mandamus action and an FPPC collection action (Petition at 10). However, the California courts do not support that view, nor does the legitimate state interest in judicial economy.

Petitioners try to maintain that an administrative mandamus action is not an adequate procedural method for resolving constitutional questions (Petition at 15). To support this assertion, Petitioners cite *Fukuda v. City of Angels*, 20 Cal.4th 805, 977 P.2d 693 (1999) for the proposition that an administrative decision is given a strong presumption of correctness upon judicial review. The actual holding of that case is that the *factual*

findings of an administrative agency are afforded a strong presumption of correctness. However, this deferential standard of review of an agency's factual findings does not apply to the agency's legal conclusions. The California Supreme Court has specifically stated that California courts have the quintessential duty to apply its independent judgment de novo when considering questions of law arising in an administrative action. *Yamaha Corp. of Am. v. State Bd. of Equalization,* 19 Cal.4th 1, 4, 960 P.2d 1031, 1034 (1998).

III. PETITIONERS HAVE WAIVED THEIR RIGHT TO CONTEST THE VALIDITY OF THE ADMINISTRATIVE ORDER

Petitioners argue that their First, Sixth, Seventh, and Eighth Amendment rights were violated (Petition at 14-20). However, Petitioners did not raise either the Sixth or Seventh Amendment as the basis for an objection in any proceeding until now. Moreover, Petitioners had the opportunity to request a hearing on the merits of all of their constitutional objections but chose not to proceed for three years. As a result, no lower state court has had the occasion to consider evidence or decide on these issues.

As to their First Amendment argument, which was not raised by Petitioners in the state appellate proceedings, Petitioners believe they are entitled to a special exception from the campaign reporting laws of the Political Reform Act (Petition at 16-18). In *Brown v.*

Socialist Workers '74 Campaign Committee, 459 U.S. 87, 93 (1982), the leading case on this issue that Petitioners did not cite, this Court decided that the First Amendment prohibited the State of Ohio from compelling disclosure by a minor political party, which could show a reasonable probability that the disclosure would subject those identified to threats, harassment, or reprisals. This Court based its holding on the rationale that since minor party candidates are not likely to "buy" elections, the "government interests supporting disclosure are weaker in the case of minor parties." (*Id.* at 95.) Petitioners want the same exception as the Ohio socialist party. However, CAC was not a minor political party that had little impact on a state election. By its own accounts, CAC dramatically affected the political landscape in California. Petitioners' self-proclaimed crowning victory was the qualification of a ballot measure that called for an extraordinary recall election against an influential state senator. Under these facts, the Ohio socialist party and CAC have nothing in common.

Petitioners further insist that the administrative penalty imposed upon them by the FPPC is unduly harsh (Petition at 14-16). To be sure, $808,000 is a considerable penalty, but one that is within the statutory authority of the FPPC and is warranted in cases of egregious misconduct.[9] In a recent decision, *United*

---

[9] Federal courts have held that if an administrative penalty does not exceed the limits prescribed by the statute authorizing it, the penalty is not excessive. *Newell Recycling Co., Inc. v. United States Envtl. Protection Agency*, 231 F.3d 204, 210 (5th Cir. 2000); *United States v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997).

States v. Mackby, 339 F.3d 1013 (9th Cir. 2003) (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)), the Ninth Circuit Court of Appeal upheld a $729,454 civil penalty against the owner of a physical therapy clinic for submitting false Medicare claims. In its decision, the court noted, among other things, that the defendant had acted knowingly, and that his actions had harmed the integrity of the Medicare system. (*Id.* at 1015-1018.) In this case, CAC was a well-funded organization that willfully deprived California voters of information regarding the source of their financial support during a significant historic state election.[10] While Petitioners may have started out as a small group of political neophytes in 1989, by 1992, and certainly by 1994, Petitioners had the sophistication and resources necessary to abide by state campaign reporting laws.

Yet Petitioners believe that their deliberate and recurring conduct is somehow mitigated by their own accounts of hostility that have never been tested in any adjudicatory proceeding. (Pet. App. at 24a-28a.) There is no doubt that Petitioners' platform angered and offended others. But the mere fact that their stance was controversial does not justify or mitigate willful noncompliance with state campaign reporting laws. Divisive issues are the cornerstone of California politics. Nevertheless, all major participants in the political process, including Petitioners, have the same duty to

---

[10] This Court recognized in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) that to deter intentional conduct, administrative agencies need the discretion to impose lower penalties in inadvertent cases, and higher penalties in deliberate cases.

comply with state campaign reporting laws regardless of their political affiliation or agenda.

CONCLUSION

This Court does not have jurisdiction to grant review of the state court decision. Therefore, the FPPC respectfully requests the Court to deny the Petition for Writ of Certiorari.

Dated: February 10, 2004

Respectfully submitted,

STEVEN BENITO RUSSO, ESQ.
Chief of Enforcement
LUISA MENCHACA, ESQ.
General Counsel
JULIA BILAVER, ESQ.
Counsel of Record

(3)

RECEIVED
MAR 11 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

No. 03-1023

IN THE

Supreme Court of the United States

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD AND STEPHEN J. CICERO,
Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court

---

REPLY BRIEF FOR THE PETITIONERS

CARL RUSSELL HOWARD
Pro se
1500 Voorhees Avenue
Manhattan Beach, CA 90266
(310) 878-0555

STEPHEN J. CICERO
Pro se
2530 Vista Way #F188
Oceanside, CA 92054
(310) 878-0555

Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	7
I. THE CALIFORNIA COURT'S DECISION DEPRIVES US OF A REASONABLE OPPORTUNITY TO HAVE OUR RIGHTS HEARD AND DETERMINED	7
II. WE DID NOT WAIVE OUR RIGHT TO ASSERT OUR CONSTITUTIONAL RIGHTS IN THIS LITIGATION	8
III. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND FLIES IN THE FACE OF THIS COURT'S RULINGS	9
IV. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR FIRST AND FOURTEENTH AMENDMENT RIGHTS	10
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

Page

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) 8

FPPC v. CAC, C038246 109 Cal.App.4th 269, 134 Cal.Rptr.2d 659 (2003) 3

FPPC v. CAC, Appellant's Appendix Cal. Ct. of Appeal, C038246 ..... 3, 4, 5, 6

FPPC v. CAC, Calif. Superior Ct. No. 96AS00039 ..... 4, 5, 6, 10

FPPC v. CAC, Opposition of Russell Howard to Plaintiff's Motion for Summary Judgment, Calif. Superior Ct No. 96AS00039 6

FPPC v. CAC, Howard decl. opposing summary judgment Calif. Superior Ct No. 96AS00039, 1/18/01 4

FPPC v. CAC, Cicero & CAC Request for Judicial Notice Calif. Superior Ct No. 96AS00039 5

FPPC v. CAC, FPPC's, Objections to Evidence Proffered by Howard Calif. Superior Ct No. 96AS00039 10

Horcher v. FPPC, Sac, Sup. Ct., 96CS00804, 1996 5

NAACP v. Alabama, 357 U.S. 449 (1958) 9

Sharon S. v. Superior Court of San Diego County, 31 Cal.4th 417, 73 P.3d 554 (2003) 8

United States v. *Mackby*, 339 F.3d 1013 (9th Cir. 2003) 10

Yamaha Corp. of Am. v. State Bd. of Equalization, 19 Cal.4th 1, 960 P.2d 1031, 78 Cal.Rptr.2d 1 (1998) 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS	Page
U.S. Constitution	
First Amendment	8, 10
Second Amendment	5
Sixth Amendment	9
Seventh Amendment	9
Eighth Amendment	9, 10
Fourteenth Amendment	9, 10
California Government Code	
Proposition 208	7
Political Reform Act, Title 9	
§ 81004.5	3
§ 83104	5
§ 83107	5
§§ 91000	7
§ 91001 (c)	3
§ 91013	3
§ 91013 (c)	3
TREATIES AND ARTICLES	
Proposition 34:	
Changes to California Campaign Finance Law Fair Political Practices Commission www.fppc.ca.gov/index.html?id=244	4
"Recall Leaders Term Massive State Complaint Overkill" Los Angeles. Times 11/19/95	4
Proposition 208: Text of Proposed Law, vote 96.ss.ca.gov/Vote96/html/BP/208text.htm	7
Fair Political Practices Commission Summaries of Past Enforcement Cases A-Z www.fppc.ca.gov/index.html?id=224	6
CAC, page 19 of Recipient Committee Campaign Disclosure Statement for 7/1/93-12/31/1993	1a

STATEMENT OF THE CASE

Respondents accuse us of hyperbole (Response at 6), yet paint us as deliberately egregious recidivists, worse than doctors who defraud Medicare (Response at 15), worse than any FPPC defendant in 30 years, including wealthy politicians and special interests that laundered millions of dollars. They argue we merit their largest fine ever issued despite the fact that only one of us engaged in reluctant, temporary, and partial civil disobedience—not to make a point or challenge a law in a pre-arranged plan, but to shield donors from harm. Despite our sentence in absentia of lifetime impoverishment discretionarily upheld without trial, they claim, "the inquiry of whether or not a state court distorted . . . a state statute is reserved for extreme circumstances, which are not present in this case." (Response at 11)

We are chided for not participating in FPPC proceedings, for not trusting them to treat us fairly and not exploit our lack of counsel. The advantage they took of us, then and since, rebuts this claim.

The FPPC is sensitive to our "hat" observation, enough to attack a strawman version of it (Response at 7-8). We do not assert the same *person* wore the hats of investigator, prosecutor, judge and jury, but that the *agency* did, and broke its own laws. Independence within this independent agency is fictional.

We had no right to *judicial* trial, only a *theoretical* right to *seek* a review that inherently favored the FPPC. That right vanished when our counterclaim was *discretionarily* dismissed by a judge who was a former assemblyman we had named for potential recall, a close ally and business associate of our *main* opponent, former Senate President Roberti. We still had a *theoretical* right to defend against a *collection action*, but the FPPC successfully fought to deny affirmative defense. At every step the FPPC pushed the court to *waive our rights for us*, and *discretionarily* affirm an excessive fine.

We did not negligently let our rights lapse. By the time we scraped up funds for *some* legal help, the fine had been issued. When our attorney informed us the FPPC had missed court hearings that *he* had attended, thereby letting its action lie dormant, we took his counsel that waiting for *them* to proceed was the prudent, economical defense, that *they* were failing to act and risked dismissal, not us. *Neither* side moved for 3 years.

Respondents state, "While Petitioners may have started out as a small group of political neophytes in 1989, by 1992, and certainly by 1994, [they] had the sophistication and resources necessary to abide by . . . reporting laws." (Response at 15). 1989 is misleading. We didn't *have* a PAC *until* 1992. Also, due to increasingly complex and severe campaign laws, thousands of California attorneys and consultants *specialize* in this area. Incumbents, moneyed interests, and political parties can afford them. We could not. Nor could we become sophisticated in campaign law and still keep our *jobs*, let alone participate effectively in politics. Is it not troubling that to participate in the political process, Americans must now develop sophistication and resources?

The claim, "CAC was . . . well-funded" is ludicrous (Response at 15). $141,000 was raised over 2 years covering 4 elections and purchasing 40,000+ signatures. Had we been well funded, we wouldn't be in this fix, but would've presented a full defense from the start, with attorneys specializing in campaign finance law.

Respondents note that the 1974 Political Reform Act (PRA) (Cal. Gov't. Code, Title 9) was supposed to end corruption by banning anonymous donation. It was also supposed to level the field between incumbents and special interests vs. concerned citizens and challengers. Pre-PRA, Californians had the privacy of anonymously donating to challengers without risking reprisal by incumbents.

We respected the intent of the PRA and complied to the best of our knowledge and resources. Only when intense

harassment was aimed at us did Howard shield donors—reluctantly, temporarily and partially. Even then he withheld only street addresses, and afterwards fully disclosed them. All other errors & omissions were inadvertent.

We *were* regrettably late on several filings; complaints were instigated by our opponents. A $10-a-day late fine was standard (Cal. Gov't Code §91013), often at least partially waived. Cal. Gov't Code §91013(c) also stated, "No liability under this section shall exceed the cumulative amount . . . in the late statement. . ." Had the FPPC fairly interpreted Howard's full disclosure and offer to amend and late file, aside from constitutional considerations, our maximum fine would've been $141,559.

The FPPC states, "in response to . . . repeated conduct" they had the Franchise Tax Board audit us for 1/1/92-6/30/94, "with some cooperation from Petitioner Howard." (Response at 3) That is a misrepresentation and admission of wrong-doing. The PRA requires FPPC to consider good faith (Cal. Gov't. Code § 91001(c) & § 81004.5). Admission: Until now, the FPPC falsely maintained "*MITIGATING FACTORS*" were "None".[1] Misrepresentation: "some" cooperation was in fact considerable. Howard, despite medical disability, attended an audit; provided copies of every donation CAC ever received even for periods not at issue and donations not subject to disclosure (under $100); ordered and provided missing bank documents; and consented to FPPC obtaining bank records directly. In fact, the real motive for our audit and unprecedented treatment was a 3/21/94 letter to the FPPC by Sen. Roberti demanding our prosecution and providing inflammatory hearsay that FPPC treated as fact while ignoring Howard's letter of denial.

The FPPC claims that we "raised $141,559 and spent $103,091", as if we kept $38,000. We spent every penny

---

[1] *FPPC v. CAC*, Cal. Ct. of Appeal, C038246, Appellant's Appendix at 236

received on CAC and campaign expenses, which the FPPC knows because it has copies of every donation and bank statement.

The FPPC states "For . . . 100 contributors of $100 or more, Petitioners did not disclose required information. . ." (Response at 3 n.3). That is misleading. Even when protecting donors, Howard disclosed accurate individual donations, city, state, and name, withholding only street address to prevent physical harassment (see Appendix 1, page 19 of our 20-page filing for 7/1-12/31/1993). Those addresses were disclosed in the audit.

Donors rarely provided occupation & employer though we asked, so a huge part of our fine is for "withholding" what the FPPC knew we never had. At the time, the FPPC vaguely required "best efforts" to get occupation & employer (Prop.34: Changes to California Campaign Finance Law; www.fppc.ca.gov/index.html?id=244).

The FPPC claims, "Petitioners received notice of their right to appear in person or by telephone". In fact, documents purporting to have personally served Howard were falsely sworn.[2] No notice of *any* kind was ever served.[3] In an 11/19/95 L.A. Times article "Recall Leaders Term Massive State Complaint Overkill", FPPC Chairman Mehta confirmed this by stating, "FPPC investigators told him that Howard had managed to avoid being served with the complaint."[4]

Cicero was fined for filings in 1992 when he was not even a *member* of CAC, Howard for 1993-95 when Cicero was listed as Treasurer. The FPPC does not deny justifying the fine by citing an opinion Howard had supposedly expressed, thereby also punishing Cicero for Howard's opinion. The

---

[2] *ibid* at 159 & 242.

[3] *FPPC v. CAC*, 96AS00039, 1/18/01. Howard decl. opposing summary judgment, stating Howard was not served, attached proof he did not live where allegedly served.

[4] C038246, Appellants Appendix at 248.

opinion was hearsay from an article Roberti gave to the FPPC, which also had Howard's letter denying it as a misquote by a hostile reporter.[5]

The FPPC says the "Executive Director" signed the accusation (Response at 4). In fact an "*acting* Executive Director" signed it, without authority, in violation of the law requiring a properly appointed Executive Director (Cal. Gov't Code §83107). When a former *Assemblyman* raised that issue as a defense to a fine, the court held improperly appointed acting Executive Directors cannot issue valid orders and granted relief.[6,7,8]

The PRA requires Commission vacancies be filled within 30 days to preserve a narrow balance between political parties (Cal. Gov't. Code §83104). On 11/2/95, when the fine became effective on execution by FPPC's Chairman, the Commission had a vacancy in excess of 30 days. When the FPPC sued us on 1/3/96, there were two such vacancies; one filled May 2, the other May 6, 1996. When they answered our Mandate Petition on 5/3/96, there was still such a vacancy.[9] The FPPC ignored this balance of power clause in our case; so did the courts when we raised it, affirming an excessive fine.

The FPPC states, "Petitioners describe CAC as a true grassroots organization with a diverse, all-volunteer staff. . . However, in previous pleadings, Petitioners have described CAC as 'activists who targeted politicians . . . supportive of . . . . restricting the ownership of guns.'" (Response at 6-7). Opposing 2nd Amendment infringement—had that been our only concern—is not inconsistent with grassroots, diversity,

---

[5] C038246, Appellant's Appendix 285-289

[6] *Horcher v. FPPC*, Sac. Sup. Ct., 96CS00804, 1996

[7] C038246, Appellants Appendix at 380-433

[8] 96AS00039, Cicero's & CAC Request for Judicial Notice

[9] C038246, Appellants Appendix at 376-379